STATE OF WISCONSIN PERSONNEL COMMISSION

PAMELA A. TAFELSKI,

Complainant,

v.

President, UNIVERSITY OF WISCONSIN (Superior),

Respondent.

Case No. 95-0127-PC-ER

RULING ON RESPONDENT'S MOTION TO DISMISS

The University of Wisconsin (UW) filed a Motion to Dismiss, dated November 28, 1995. Both parties are represented by counsel. A briefing schedule was established under which the final brief was filed on January 22, 1996. The information recited below appears to be undisputed by the parties, except as specifically noted to the contrary.

BACKGROUND

1. The Commission received Ms. Tafelski's complaint on August 30, 1995, in which she alleged discrimination on the basis of sex and handicap. The text of her complaint is shown below.

a. I was discriminated on the basis of sex-female as follows:

I was hired by UW-Superior in July of 1983 as Assistant to the Director, Administrative Specialist II. My responsibilities were 60% extension-Department of Continuing Education and 40% for the business and economics area. After being employed for five years, I began having two-year rolling appointments. My duties included planning, coordinating, marketing and implementing all business outreach management workshops, seminars, and conferences in an eight-county region in Northwestern Wisconsin. I was also responsible for desk-top publishing, all promotion and advertising, the Governor's Conference, and initiating Small Business Week for Douglas County.

In 1991, a new Director for the Small Business Development Center was hired, Neil Hensrud. Following an injury, I took a medical leave of absence from February to May 16, 1992, in order to have a cervical fusion. The problems with Mr. Hensrud started

during my leave of absence. He often called me at home, very demanding, telling me that he wanted me to come in and find things or to do work, and was very condescending. Upon my return, Hensrud told me that I was of "no value" to him or the office unless I started teaching workshops and seminars. I told him that because I did not have a B.S. degree, I did not feel qualified to teach. (I am not aware of others without a degree who have taught at UW-Superior.) He then told me that he expected me to complete my degrees and start on my masters. Given my medical situation, I asked him to put that in writing, if it was indeed a job requirement, including consequences if I was unable to complete the same. He refused to do that, and I did not pursue the matter due to my medical condition.

I began teaching in 1993 as a result of coercion by Mr. Hensrud, although I did not feel qualified or comfortable doing this. I had offered to co-teach, but Hensrud insisted that I teach, or he would set up workshops, and then at the last minute tell me he couldn't do it, and that I had to.

Other women in the office have had trouble dealing with Mr. Hensrud. He has insulted people, including me, for wearing perfume, saying, "You know what it makes you look like when you wear perfume." Hensrud would have his wife come in with his children and leave the children with female staff (including me) and then leave the office with his wife. He never once left any of his children with any of my male co-workers.

In December of 1993, Mr. Hensrud threw his briefcase at me in anger because I had attempted to proctor a scheduled exam for him, which he had apparently rescheduled without authority. When he found that I tried to cover for him, he was in a rage and threw the briefcase at me. (It did not hit me because I moved out of the way). I spoke with his supervisor, Mary Jane Sullivan, about the briefcase incident, and about Hensrud treatment of me. She referred us [?] to Jeff Thompson, an ad hoc facilitator of the Total Quality Management Process. As facilitator, Mr. Thompson would schedule various meetings. Hensrud attended the initial meeting, but after discovering he was the focus of the meetings, did everything possible to avoid participating. He would not attend, reschedule, or cancel the meetings entirely. Consequently, nothing ever came of these Quality meetings.

The harassing and demeaning treatment continued in 1994. In February or March of 1994, I told Mr. Hensrud that I had been able to procure the assistance of John Podlesny, Coordinator-Economic Development-Northern States Power Company, to establish sponsors for various upcoming conferences, including the International Trade Conference. Hensrud asked, "What did you do for him", implying I had done something illicit in order to curry Mr. Podlesny's favor. Hensrud would have Program Assistants record when I came in, when I left, where I was going, and he would have them call to check and see if I was where I said I was going.

In July of 1994, I asked Dr. Sullivan to move my office or to put Business Outreach under another umbrella, so that I could report to someone other than Hensrud. She said that she would

talk to Hensrud. Approximately a week after that, I talked to the Affirmative Action Officer, Barb Erickson. Ms. Erickson told me the procedure for filing a complaint and I said that I would try to put something together. The next day, Ms. Erickson called and said that she had talked to Hensrud and to Mary Jane Sullivan, and said "You know, you can lose this". Ms. Erickson had never mentioned going to Hensrud and Mary Jane Sullivan to talk to them about this, surely not before I filed a formal complaint. Due to Ms. Erickson's actions, I was dissuaded from pursuing the matter at that time.

I began seeing a counselor in July or August of 1994, due to the inordinate amount of stress at work, as well as problems that this stress was causing in my marriage. I began gambling in July of 1994 and filed for divorce in September of 1994. I informed Mr. Hensrud of my marital problems and asked him to be patient if my work product was less than it had been in the past. He indicated that he would assign one of the student assistants to work for me. When I went to talk to the student assistant about a large project that we had decided she would be given, I was told that she was not to take any work, that she was doing work for Loren Erickson, a male co-worker. When I went to Hensrud to ask what was going on, he said, "Oh, yeah, I changed my mind". He offered no guidance as to how the large project would be handled.

By October of 1994, I was having severe emotional problems. My self-esteem and confidence had been completely emasculated by Mr. Hensrud. I was still in counselling and still gambling. I felt I had no choice but to remove myself from that environment, and wrote a letter of resignation dated October 1, 1994. Two days later when I saw my counsellor, he suggested that that was not a lucid decision on my part; that I wasn't in an appropriate frame of mind to be making decisions like that for myself, and I realized that he was right. I immediately went to talk to Hensrud and asked if I could rescind my resignation, to which he simply replied, "No.".

I then went to speak to the Vice Chancellor, Hal S. Bertilson. I told him that I was not well and asked for a leave of absence, rather than resigning from my position. I told the Vice Chancellor of the problems I had had with Hensrud, as well as my personal problems caused by the work environment. He told me he would think about my situation and later informed me that he would not accept my request to rescind the resignation. My resignation was effective November 7, 1994.

<u>b. I was discriminated against because of a handicap-emotional problems as follows:</u>

It was obvious by September 1994, that I was not emotionally stable. When I tried to rescind my resignation two or three days after submitting it, I explained the problems I was having to Mr. Hensrud. He refused to listen to me, and simply denied my request to rescind the resignation without giving me any reason. When I spoke with the Vice Chancellor, I explained to him the

emotional problems that I was having due to Hensrud's treatment of me, his harassment, and demeaning treatment. I advised him that I was seeing a counsellor, and asked him for a leave of absence, an extension of the date of resignation to the end of the fiscal year for which my position was budgeted, or to rescind the resignation entirely. He refused any requests to accommodate my situation, though it would not have imposed undue hardship. Knowing my state of mind at the time I drafted the resignation, it was not reasonable for him to deny my request to rescind the resignation particularly in light of my years of exceptional service to the University.

I am requesting reinstatement with back pay, a cease and desist order which would entail sensitivity training for Mr. Hensrud, and attorneys fees and costs incurred to the time of reinstatement.

2. Ms. Tafelski's resignation letter was addressed to Mr. Hensrud and was dated October 1, 1994. Mr. Hensrud received the letter on October 4, 1994. The text of the letter is shown below. (Attachment 1 to UW's Motion dated 11/28/95).

After a great deal of thought and planning, I have decided to return full-time to the classroom to complete that part of my life that has been on hold far too long. . .my bachelors and masters degrees.

With this in mind, and wanting to put the necessary energies into my studies, I respectfully submit this letter as my official resignation as Administrative Specialist/Business Outreach Coordinator here at UW-Superior's Small Business Development Center, effective November 7, 1994.

After eleven+ years, this was a very difficult decision for me. There's a certain level of allegiance that one develops after a period of time, as you well know. I have learned a great deal while working with, I believe, the most dedicated, committed colleagues this University has to offer. I will miss that comradery.

I will do my best to see that any in-process work for which I am responsible is completed by November 7th. As always, I wish you, the staff, Hans, and the SBDC network continued and even greater success.

3. Vice Chancellor Bertilson wrote Ms. Tafelski a letter accepting her resignation on October 4, 1994. (Attachment 2 to UW's motion) By letter dated October 12, 1994, Ms. Tafelski informed Vice Chancellor Bertilson

that she had not yet received his letter of October 4th. She further stated as shown below. (Attachment 3 to UW's motion)

> In making your decision regarding my request to rescind my resignation, I would ask that if you should decide in the negative please consider allowing me to extend the resignation date to the end of the fiscal year, 30 June 1995.

4. Vice Chancellor Bertilson met with Ms. Tafelski on October 27, 1994, to discuss her request to rescind her resignation and denied the request orally during the meeting. He informed her that his decision was based on the likelihood of a loss of funding from UW-Extension for her department and that because the UW-Extension provided partial support for the Center for Continuing Education, the withdrawal of funding would necessitate restructuring of complainant's position, as well as the positions of other staff. (Bertilson Affidavit, ¶5, attached to UW's motion) By letter dated October 27, 1994 (attachment 4 to UW's motion) she requested that his decision be placed in writing. He sent her a letter dated October 31, 1994, confirming his decision. The entire text of the letter is shown below. (Attachment 5 to UW's Motion)

> The purpose of this letter is to confirm in writing the decision I communicated to you on October 27. I accepted your resignation on October 4.
>
> Given the restructuring planning that has begun, I have decided to not rescind my decision to accept your resignation. Your resignation is effective November 7.

5. The 300-day period prior to August 30, 1995 (the date upon which Ms. Tafelski's complaint was filed), commenced on November 3, 1994.

6. Ms. Tafelski, through her attorney, filed a response to the UW's Motion to Dismiss, which was received by the Commission on January 10, 1996, with the signed, supporting affidavit received by the Commission on January 19, 1996. In paragraph 4 of her affidavit, Ms. Tafelski alleges as shown below.

> One of my coworkers, Loren Erickson, made the comment to me, "Ha, Ha, I got you back" on my last day of work [November 17, 1994]. I assume that he was expressing joy that my employment

was terminated, since I had filed an internal complaint against him for putting up a sign that read "Tafelski's Brothel".

Regarding this allegation, Ms. Tafelski's attorney stated as follows:

> There are a few additional facts not included in Tafelski's complaint, which may have a bearing on the decision regarding respondent's Motion to Dismiss. Neil Hensrud's treatment of Pamela Tafelski was demeaning and belittling each and every day of her employment. (Tafelski Aff., par. 2) His disrespectful treatment of her served to create a hostile environment, so that other male coworkers felt safe in treating Tafelski in a demeaning manner. Previously, a male coworker, Loren Erickson, put up a sign at work which read "Tafelski's Brothel". Tafelski filed an internal complaint against Erickson as a result of this. On Tafelski's last day of work, November 7, 1994, Erickson said to her, "Ha, Ha, I got you back." (Tafelski Aff., par. 4)
>
> (Complainant's responsive brief, p. 1.)

The UW denies that Mr. Erickson made the alleged comment. The UW further points out that the incident regarding the "Brothel" sign occurred in 1992, and was resolved.

7. Ms. Tafelski alleged in her reply to the UW's motion (Id., Affidavit, ¶2) that Mr. Hensrud's sexual discrimination against her continued up through her last day of work in that he "continually checked on me in the latter part of 1994, to be sure that I was where I said I was going to be, to be sure that I came to work on time, etc. He did not do this with other male coworkers."

8. Ms. Tafelski alleged in her reply to the UW's motion (Id., Affidavit, ¶3) that Mr. Hensrud's handicap discrimination continued up through her last day of work in that "[r]ather than trying to accommodate my emotional problems, after discussing them with him, Hensrud instead took away the assistant that he promised me in order to help me perform my work, and gave the assistant to . . . [Mr.] Erickson. He [Hensrud] continued to expect me to perform more work than I reasonably could, as he well knew, through November 7, 1994." Ms. Tafelski does not allege that Mr. Erickson had no handicap.

9. Ms. Tafelski also alleged in her reply to the UW's motion that although Vice Chancellor Bertilson cited budget cuts with resulting need to

restructure her position as a reason for his decision not to allow Ms. Tafelski to withdraw her resignation, that in approximately January of 1995, her position was filled by a non-handicapped male; an event which she learned of in February or March of 1995. She has not alleged that the position filled in January 1995, was structured the same as her prior position.

DISCUSSION

A. Standard of Review on Timeliness Motion

Ms. Tafelski has the burden to demonstrate that her claims were timely filed. As the UW acknowledged in its reply brief (dated January 22, 1996, footnote on page 3) it is appropriate at this stage of the proceedings to construe the allegations raised in the complaint in the light most favorable to Ms. Tafelski.

B. Allegations Raised in the Initial Complaint and subsequent documents.

Ms. Tafelski alleged certain acts of discrimination in the complaint she filed on August 30, 1995 (hereafter, referred to as the "Initial Complaint"). She made additional allegations in her reply to the UW's brief which was filed on January 10, 1996 (hereafter, referred to as "C's Reply Brief"). The chart below indicates the source document of all allegations presented by Ms. Tafelski.

Allegation	Source Document
1. Sex Discrimination: Sexually harassing atmosphere and/or disparate treatment based on sex, with Mr. Hensrud as the alleged discriminator, as shown by the following incidents:	
1a. "You know what it makes you look like when you wear perfume." (Date unspecified)	Initial Complaint

1b. Leaving his children with complainant at the work-place but never with male cowkrs. (Date unspecified.)	Initial	Complaint
1c. Dec. 1993, briefcase throwing.	Initial	Complaint
1d. In Dec. 1993, Tafelski tells supv. about Hensrud's "treatment" of her, and to Jeff Thompson. Hensrud fails to appear at various attempted follow-up meetings.	Initial	Complaint
1e. Feb. or March 1994 comment: "What did you do for [Podlesny]?"	Initial	Complaint
1f. Unspecified dates 1994, having program assts. record where she was going, and then Hensrud's calls to see if she went where she said she was going; actions which Hensrud never took against male coworkers.	Initial	Complaint
1g. Reversal of decision to provide an assistant on a large project, and giving the help to a male co-worker instead. (Unspecified date in/after July 1994.)	Initial	Complaint
1h. Week of October 4, 1994, refusal to allow Ms. Tafelski to rescind her resignation.	Initial	Complaint
1i. Hensrud's sex discrimination continued up through her last day of work in regard to continuation of allegations designated above as "f)" and "g)".	C's Reply Brief	
1j. Mr. Erickson's comment on complainant's last day of work which she took as his expression of joy that she was leaving; such joy stemming from an internal complaint she filed against him in 1992, in regard to the brothel sign; an action which complainant alleges occurred due to the atmosphere fostered by Hensrud.	C's Reply Brief	
1k. Complainant's discovery in or about January 1995, that her position was filled by a male.	C's Reply Brief	

2. Handicap Discrimination

2a. By Hensrud in the week of October 4, 1994, by *refusing to allow com*-plainant to rescind her resignation.	Initial Complaint
2b. By Bertilson on Oct. 27, 1994, by refusing to allow complainant to rescind her resignation.	Initial Complaint
2c. By Bertilson, due to complainant's discovery in or about January 1995, that her position was filed by a non-handicapped individual.	C's Reply Brief
2d. By Hensrud reversing decision to provide Ms. Tafelski with an assistant for a large project as an accommodation of her handicap.	C's Reply Brief

C. Actionable Period

The actionable period is the 300-day period prior to the date the charge of discrimination was filed. s. 111.39(1), Stats. Ms. Tafelski filed her Initial Complaint on August 30, 1995, resulting in an actionable period starting on November 3, 1994.

Actionable Period - Allegations in Initial Complaint

Two allegations raised in the Initial Complaint were recited without provision of dates (allegations numbered in s. B above as 1a. and 1b.). Most allegations made in the Initial Complaint clearly involved events occurring prior to November 3, 1994 (allegations numbered in s. B above as 1c., 1d., 1e., 1h., 2a., and 2b.). Other allegations were recited without a clear statement of the period referenced (allegations numbered in s. B above as 1f., and 1g.). It appeared from the Initial Complaint that all allegations made occurred prior to the actionable period.

Actionable Period- Unaffected by later discovery of replacement hire

Ms. Tafelski's attempts to keep the following allegations viable on the basis that she discovered in February or March of 1995, that "her position" was

filled in January 1995, by a male who was not handicapped. (The numbering system below corresponds to section B above.)

1h. Allegation of sex discrimination in Hensrud's decision (in the week of October 4, 1994) that Ms. Tafelski would not be allowed to rescind her resignation.
2a. Allegation of handicap discrimination in regard to the same decision by Hensrud, as described in #1 above.
2b. Allegation of handicap discrimination in regard to Bertilson's later decision (On October 27, 1994) not to allow Ms. Tafelski to rescind her resignation.

The Commission in resolving the pending motion, accepts as true complainant's allegations: a) that Vice Chancellor Bertilson told Ms. Tafelski on October 27, 1994, he would not allow her to rescind her resignation because of likely budget cuts which would necessitate restructuring her position (if the budget cuts occurred); and b) that Ms. Tafelski discovered in February or March of 1995, that "her position" (taken in the light most favorable to complainant to mean "her unrestructured position") was filled in January 1995, by a male who was not handicapped.

A potential exists that Ms. Tafelski's later discovery that her position was filled may have a bearing on the timeliness of the three allegations listed above. The applicable legal theories were explained by Judge Posner in Cada v. Baxter Healthcare Corp., 920 F.2d 446, 54 FEP Cases 961, 963-4 (7th Cir., 1990), cert. den. 115 L. Ed. 1079, 111 S.Ct. 2916, 501 US 1261, a discharge case filed under the ADEA:

> Tolling doctrines stop the statute of limitations from running even if the accrual date has passed. Two tolling doctrines might be pertinent here . . . One . . . is equitable estoppel, which comes into play if the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations. Equitable estoppel in the limitations setting is sometimes called fraudulent concealment . . . To the extent that such efforts succeed, they postpone the date of accrual by preventing the plaintiff from discovering that he is a victim of a fraud . . . Fraudulent concealment in the law of limitations presupposes that the plaintiff has discovered, or . . . should have discovered, that the defendant injured him, and denotes efforts by the defendant--above and beyond the wrongdoing upon which the plaintiff's claim is founded--to prevent the plaintiff from suing in time. (Citations omitted.)
> * * *

> The second tolling doctrine is equitable tolling. It permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim. . . It differs . . . in that it does not assume a wrongful--or any--effort by the defendant to prevent the plaintiff from suing. It differs . . . in that the plaintiff is assumed to know that he has been injured, so that the statute of limitations has begun to run; but he cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant. If a reasonable man in Cada's position would not have known until July 7 that he had been fired in possible violation of the age discrimination act, he could appeal to the doctrine of equitable tolling to suspend the running of the statute of limitations for such time as was reasonably necessary to conduct the necessary inquiry. The qualification "possible" is important. If a plaintiff were entitled to have all the time he needed to be *certain* his rights had been violated, the statute of limitations would never run--for even after judgment, *there is no certainty.* (*Citations omitted. Emphasis appears in* original.)

The Commission has recognized both of the tolling doctrines discussed in Cada. The concealment theory was used to reach a layoff discrimination claim in Sprenger v. UW-Green Bay, 85-0089-PC-ER (7/24/86). The unavailable information theory was used to reach the alleged disparate impact resulting from equity awards in Rudie v. DHSS & DER, 87-0131-PC-ER (9/19/90).

The complainant in Sprenger, Id., was told on May 6, 1983, that his position was being eliminated and he would be laid off effective June 20, 1983. On June 10, 1985, he realized his position had not been eliminated as it was filled sometime during the 1984-5 school year. His complaint of age discrimination was filed more than 300 days after he received notice of his layoff, but within 300 days after he discovered that his position had not been eliminated. The Commission accepted his complaint as timely-filed stating (on pp. 9-10 of its decision) as shown below.

> In the context of this motion to dismiss, it does not appear to the Commission that this is a case where it could be said that "the facts that would support a charge of discrimination . . . were *apparent or should have been apparent to a person with a* reasonably prudent regard for his rights similarly situated to the (complainant). Particularly in a personnel transaction such as this, which on its face was not predicated on employe misconduct or inefficiency, a prudent employe normally should be able to rely on the bona fides of the employer's explanation of the seemingly neutral reasons for the transaction. In fact, any other

> result could open the door to potential abuse, as an employer wanting to get rid of an older employe could do so with impunity if it could manage to delay 300 days in filling the position with a younger employe.

Ms. Tafelski's situation, however, is significantly different than the facts presented in Sprenger, id. The employer in Sprenger disclosed as a fact that Mr. Sprenger's position had been eliminated. The Commission held that Mr. Sprenger had the right to trust the information given him by the employer and, further, that Mr. Sprenger had no reason to doubt the information from the employer until he later discovered information to the contrary. The Vice Chancellor in Ms. Tafelski's case disclosed not facts as certainty or as decisions already made. Rather, Vice Chancellor Bertilson told Ms. Tafelski on October 27, 1994, that budget cuts were possible (but not a certainty) and that her position would need to be restructured if budget cuts occurred. Ms. Tafelski's later discovery that the UW hired a non-handicapped male to fill her unrestructured position is insufficient to conclude that the Vice Chancellor withheld information or that the information he provided was designed to delay the filing of her complaint.

The complainant in Rudie alleged disparate impact on the basis of age in regard to equity awards. The equity awards were granted in June of 1985 and June of 1986, which was more than 300 days prior to the filing of Rudie's complaint. The Commission ruled that the complaint was timely filed due to complainant's discovery in February 1987, of the questioned salary disparities. The rationale is reflected in the following quote from pp. 2-3 of the Commission's decision:

> In applying the test set forth in Sprenger, the key question in the factual context of this case is whether "the facts which would support a charge of discrimination were . . . apparent [or] would . . . have been apparent to a similarly situated person with a reasonably prudent regard for his or her rights," (footnote omitted), during the period when the other officers received their equity awards in 1985 and 1986. The gravamen of complainant's charge of discrimination is that younger, less senior officers in the same classification were being paid at a higher rate, and that this violated the Fair Employment Act prohibition against age discrimination. At the time the younger officers' salaries were increased by equity awards (while complainant's salary was not), it seems clear that these facts would not have been known to complainant unless he asked

> under the open records law for information about the salaries of the younger Officer 6's with whom he worked. The question then under the Sprenger test is whether a person with a reasonably prudent regard for his or her rights in complainant's situation would have made such inquiry. In the Commission's opinion, the answer must be no. Complainant at that time had no apparent reason to have believed he was being paid less than other Officer 6's who were younger and who had less seniority. That being the case, why would he have felt the need to make such an inquiry?

The circumstances of Ms. Tafelski's case are significantly different than the circumstances in Rudie. Unlike Rudie, Ms. Tafelski was aware from the Vice Chancellor's disclosure on October 27, 1994, that budget cuts could impact on the structure of her position. Prior to such disclosure she already had formed an opinion that Mr. Hensrud had discriminated against her on the basis of sex and handicap. A person with a reasonably prudent regard for her rights in Ms. Tafelski's situation would have made inquiry on or after October 27, 1994 (the date of the Vice Chancellor's disclosure), to determine if the Vice Chancellor's explanation was worthy of credence and, if not, whether his decision might be an extension of the discrimination by Mr. Hensrud. The circumstances in Ms. Tafelski's case do not justify using any date but the date of actual notice (October 27, 1994) to commence the limitations period.

The Commission notes that Ms. Tafelski could not argue that Mr. Hensrud offered a misleading explanation for refusing to allow her to rescind her resignation because she says he offered no explanation. Ms. Tafelski knew in the week of October 4, 1994 (when Mr. Hensrud denied her rescission request) that she felt his past actions were discriminatory. Accordingly, the circumstances here also do not justify using any date but the date of actual notice to commence the limitations period. As stated in Christensen v. UW-Stevens Point, 91-0151-PC-ER, p. 4 of Decision and Order (11/13/92):

> [T]he Commission concludes that complainant . . . had formed the belief that something other than program considerations had prompted Dr. Leafgren's non-renewal decision . . . Keeping in mind that it is the time at which the information which would lead a person to believe that discrimination may have occurred was obtainable, not the time at which the belief was actually formed, which governs a timeliness determination, the Commission concludes that such information was not only obtainable to complainant in 1989 but had been formed at least in

part and had led to a belief on his part that he had been discriminated against. (Emphasis added.)

Actionable Period - Summary

The actionable period for all allegations is the same (November 3, 1994 - August 30, 1995), despite the alleged later discovery that her position was filled by a non-handicapped male. The conclusion remains that all acts alleged in the Initial Complaint occurred before the actionable period.

D. Allegations raised for the first time in C's Reply Brief treated as request to amend Initial Complaint.

Ms. Tafelski raised several allegations in C's Reply Brief which were not mentioned in the Initial Complaint. The Commission must first determine whether Ms. Tafelski is entitled to amend her Initial Complaint to include these newly-raised allegations. If amendment is granted, then a need exists for the Commission to also resolve the timeliness issue relating to the amendment.

The newly-raised allegations are listed below, with cross-reference to the numbering system used in section B of this ruling.

Sec. B (above) Refc. Number	Allegation Description
1i.	Up through her last day of work, Mr. Hensrud continued to have PAs check where she was going and he would continue to make verification calls.
1i.	The impact of Hensrud's decision in July 1994, continued to impact on Ms. Tafelski up through her last day of work; an allegation relating to Hensrud's decision not to provide Ms. Tafelski with an assistant for a large project and, instead, providing the assistant to help a male co-worker.
1j.	Erickson comment on Ms. Tafelski's last day of work which she says relates to his 1992 placement of a brothel sign, an act she attributes to the environment created by Hensrud.
2d.	Handicap failure to accommodate alleged in

> regard to Hensrud's decision not to provide Ms. Tafelski with an assistant for a large project.

Amendment Requests - General Principles

The Commission's administrative rule governing amendments is found in s. PC 2.02 (3), Wis. Adm. Code, shown below.

> **PC 2.02 Complaints.**
> * * *
> (3) AMENDMENT. A complaint may be amended by the complainant, subject to approval by the commission, to cure technical defects or omissions, or to clarify or amplify allegations made in the complaint or to set forth additional facts or allegations related to the subject matter of the original charge, and those amendments shall relate back to the original filing date.

Interpretive guidance on when it is appropriate for the Commission to grant amendment, has been provided in prior cases. A summary of some case rulings was included in Chelcun v. UW-Stevens Point, 91-0159-PC-ER (3/9/94), at pp. 9-10, as shown below.

> A complaint places the respondent on notice of two basic elements, to wit: the act complained of (such as failure to hire) and the discriminatory bases alleged (such as race and age). The Commission generally has allowed amendments to add an alleged basis of discrimination, but not to add acts complained of which bear no relation to the act complained of in the original complaint. Compare, for example, Jones v. DNR, 78-PC-ER-12 (11/8/79) and Adams v. DNR & DER, 80-PC-ER-22 (1/8/82), where amendment was permitted to add additional basis of discrimination; to Pugh v. DNR, 86-0059-PC-ER (6/10/88) where amendment was not permitted to add discrete, separate personnel transactions whether such newly-alleged acts pre- or post-dated the act complained of in the original complaint.
>
> The distinction made in the Commission cases noted above represents a balancing of interests between the parties. . . The burden for both parties is much greater where the amendment attempts to add an act which does not relate to the act complained of in the initial complaint. This is true because the opportunities to identify witnesses and preserve evidence is jeopardized.
>
> Even where an amendment would be favored under principles mentioned above, the Commission has rejected amendment where . . . requested . . . after the Initial Determination was issued. . . . The Commission, of course, has processed allegations made in tardily-filed amendments as a new

charge of discrimination when filed within 300 days of the newly-alleged adverse actions.

Requested Amendment - Adding handicap basis to allegation that Hensrud denied help on large project.

Ms. Tafelski alleged in her Initial Complaint that Mr. Hensrud discriminated against her either by disparate treatment based on sex or by a sexually harassing atmosphere. One specific allegation related to Mr. Hensrud's failure (in/after July 1994) to provide her with help to finish a large project and instead, giving the help to a male co-worker. The requested amendment is to add a handicap accommodation issue in regard to the same actions by Mr. Hensrud. (See chart in section B above, items designated as 1.g. and 2.d.) This amendment request is consistent with the Commission's prior rulings and is granted. A separate question remains as to the timeliness of this new allegation, which is addressed in a later part of this section.

Requested Amendment - Clarifying time period in regard to Hensrud denial of help on large project.

Ms. Tafelski alleged in her Initial Complaint that in/after July 1994, Mr. Hensrud failed to provide her with help on a large project and, instead, gave the help to a male co-worker. She requests the opportunity to amend the allegation to clarify that this action by Mr. Hensrud continued to impact her employment up through her last day of work. (See chart in section B. above, items designated as 1.g. and 1.i.) Such request is an amplification of allegations made in the Initial Complaint and, accordingly, is granted. Of course, a separate question remains (addressed later in this section) as to whether this allegation was timely filed.

Requested Amendment - Clarifying time period in regard to Hensrud checking on whereabouts.

Ms. Tafelski alleged in her Initial Complaint that Mr. Hensrud had program assistants record where she was going, and then he called to see if she actually went there. The Initial Complaint failed to specifically state the time period associated with this allegation. She now requests an amendment to

clarify that these actions by Mr. Hensrud continued up through the end of her employment. (See chart in section B. above, items designated as 1.f. and 1.i.) This also is a request to amplify (or clarify) allegations made in the Initial Complaint and, accordingly, is granted. Of course, a separate question remains (addressed later in this section) as to whether this allegation was timely filed.

Requested Amendment - Erickson actions.

Ms. Tafelski requests to amend her Initial Complaint to include the alleged comment made by Mr. Erickson on her last day of work and the 1992 incident she believes such comment referenced. (See item designated as 1.j, in the chart in section B above.) The 1992 incident was resolved well before her last day of work. Ms. Tafelski has not alleged that the Erickson comment on her last day of work was discriminatory in and of itself. Nor does the Commission see how the comment could be characterized as such.

The alleged incident involving Mr. Erickson in 1992 and the presumed related comment on Ms. Tafelski's last day of work, were discrete events separate from the allegations raised in the Initial Complaint. The Initial Complaint contains no reference to Mr. Erickson or to the 1992 brothel sign incident. Accordingly, the Erickson allegations standing alone cannot be characterized as a clarification or amplification of allegations made in the Initial Complaint, as would be allowed as an amendment under s. PC 2.02(3), Wis. Adm. Code.

The applicable administrative code also allows amendments which "set forth additional facts or allegations related to the subject matter of the original charge". s. PC 2.02 (3), Wis. Adm. Code. Ms. Tafelski attempts to meet this portion of the rule by alleging that Mr. Erickson's actions occurred due to the sexually-discriminating atmosphere created by Mr. Hensrud's treatment of Ms. Tafelski. Ms. Tafelski's Initial Complaint contained no allegation that Mr. Hensrud's actions fostered co-workers to treat her in a discriminatory manner. Accordingly, her assertions regarding Mr. Erickson are insufficiently related to the matters alleged in the Initial Complaint to allow as amendments.

Amendments - Timeliness analysis

The next question is whether the permitted amendments result in a determination that an act of discrimination "occurred" in the actionable

period, within the meaning of s. 111.39(1), Stats. Adding the basis of handicap to the allegation of failing to provide an assistant on a large project, is an amendment which has no bearing on the date of occurrence question. Only the two remaining amendments require analysis.

Ms. Tafelski amended her complaint to include the allegation that Hensrud's earlier denial of assistance on a large project continued to impact on her job through her last day of work. Hensrud made his decision in July 1994, at which time Ms. Tafelski would have known that the decision would continue to impact upon her employment until completion of the project. Under these circumstances, the continued impact did not involve a separate occurrence of discrimination during the actionable period.

Ms. Tafelski alleged in her Initial Complaint that Mr. Hensrud had program assistants check on her whereabouts and that he would verify the same. The allowed amendment clarified that Mr. Hensrud repeated this conduct during the actionable period. Based on the allegations made by Ms. Tafelski, it does not appear that Mr. Hensrud made a decision prior to the actionable period that Ms. Tafelski's whereabouts would be checked for a period to continue into the future. Accordingly, Ms. Tafelski would have no reason to know that his checking on her whereabouts would continue in the actionable period as a result of any discrete decision made prior to the actionable period. Rather, it appears Mr. Hensrud made the decision to check up on Ms. Tafelski's whereabouts on occasion(s) prior to the actionable period and on occasion(s) during the actionable period.

Amendments - Timeliness Summary

Only one allegation raised by Ms. Tafelski (considering the Initial Complainant as well as permitted amendments) occurred within the actionable period. Specifically, only the allegation about Mr. Hensrud's checking on Ms. Tafelski's whereabouts occurred during the actionable period. This is an allegation raised as sex harassment and/or unequal treatment based on sex. The remaining question is whether such timely allegation is sufficient to allow Ms. Tafelski to litigate all or any of the other allegations she raised in her Initial Complaint and in the accepted amendments. She claims entitlement to such result under the continuing violation doctrine.

E. Continuing Violations - general principles.

The continuing violation doctrine allows an employe to get relief for an otherwise time-barred act by linking it with an action that occurred within the limitations period. Selan v. Kiley, 59 FEP Cases 775, 778, (7th Cir., 1992) The doctrine has been applied by federal courts in relation to the time limits for filing a Title VII complaint with the EEOC. This is a developing doctrine, rather than a well-established one. Terminology and results may vary from one federal court to another. Further, the Wisconsin courts have not yet had an opportunity to address the question of whether the continuing violation doctrine has applicability under the FEA and, if so, under what circumstances.

The seventh circuit in Selan, id., provided some guidance for application of the continuing violation doctrine. The Selan court discussed three theories for application of the continuing violation doctrine. The three theories discussed in Selan may not be exhaustive, but appear to address all arguments raised by Ms. Tafelski.

> The continuing violation doctrine allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period. For purposes of the limitations period, courts treat such a combination as one continuous act that ends within the limitations period. This court most fully addressed the continuing violation doctrine in Steward v. CPC International, Inc., 679 F.2d 117 [33 FEP Cases 1680] (7th Cir. 1982). In Stewart, we discussed three viable continuing violation theories . . . The first theory stems from "cases, usually involving hiring or promotion practices, where the employer's decision-making process takes place over a period to time, making it difficult to pinpoint the exact day the 'violation' occurred." Id., at 120. Courts have tolled the statute in such cases for equitable reasons similar to those underlying the federal equitable tolling doctrine. . . . The second theory stems from cases in which the employer has an express, openly espoused policy that is alleged to be discriminatory. Id. at 121. . . The third continuing violation theory stems from cases in which "the plaintiff charges that the employer has, for a period of time, followed a practice of discrimination, but has done so covertly, rather than by way of an open notorious policy . . . In such cases the challenged practice is evidenced only by a series of discrete, allegedly discriminatory, acts." Id. This brand of continuing violation has also been referred to as a "serial violation," Mack, 871 F.2d at 183, and as a "pattern of ongoing discrimination." Santos v. Rush-Presbyterian-St. Luke's Med. Ctr., 641 F.Supp. 353, 357 [43 FEP Cases 563] (N.D. Ill. 1986). . .

> Under the third theory, the question is whether, in response to the defendants' motion for summary judgment, [the employe] produced sufficient evidence to establish that there existed a genuine issue of fact whether the defendants' acts were "related closely enough to constitute a continuing violation" or were "merely discrete, isolated, and completed acts which must be regarded as individual violations" Berry v. Board of Supervisors of L.S.U., 715 F.2d 971, 981 [32 FEP Cases 1567] (5th Cir. 1983). The Fifth Circuit has suggested three factors to consider in making this determination:
>
> > The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?
>
> Id. This court and others have stressed the significance of the third factor:
>
> > What justifies treating a series of separate violations as a continuing violation? Only that it would have been unreasonable to require the plaintiff to sue separately on each one. In a setting of alleged discrimination, ordinarily this will be because the [employe] had no reason to believe he was a victim of discrimination until a series of adverse actions established a visible pattern of discriminatory treatment.
>
> Malhotra v. Cotter & Co., 885 F.2d 1305, 1310 [50 FEP Cases 1474] (7th Cir. 1989).

It is instructive to see how the Selan court applied the doctrine. Ms. Selan was hired at a children's psychiatric hospital in 1976. In district court she sought relief for two employment actions: a) on May 31, 1985, she was transferred to the state mental health hospital in a lower position but with the same salary and fringe benefits; and b) in 1988, her professional credentials pertaining to clinical supervisory privileges were withdrawn.

The appellate court looked at the allegations raised by Ms. Selan to determine if any of the three theories discussed in Stewart (as part of the continuing violation doctrine) were applicable. The first theory stems from cases where it is difficult to pinpoint the exact violation date due to the involved decision-making practices of the employer. The Selan court found the first theory inapplicable to Ms. Selan's case, noting as shown below.

> Although Ms. Selan's 1985 transfer/demotion arguably took place over several days (indeed, several weeks passed between the day the decision was made, the day the decision was communicated to Ms. Selan, and the day she actually transferred), this theory is not relevant to [Ms. Selan's case] because even the latest date of the 1985 transfer fell outside of the limitations period. Selan, 59 FEP Cases at 778.

Selan, 59 FEP Cases at 778. The second theory pertains to challenges of an employer's express, open policy. The Selan court found the second theory inapplicable because Ms. Selan did not allege the existence of any open or express policy related to her case.

The third theory of the continuing violation doctrine discussed by the Selan court pertains to allegations of covert discrimination evidenced only by a series of discrete acts. This theory also was found inapplicable to Ms. Selan's allegations, as the following excerpt indicates.

> [V]iewing the evidence in the light most favorable to Ms. Selan, she presented the court with evidence of two acts that occurred between the May 1985 transfer and the July 1988 removal of privileges: the late-1985 removal of individual psychotherapy responsibility, and the October 1987 removal of clinical supervision responsibility. Ms. Selan contends that these separate acts support the conclusion that the time-barred 1985 transfer/demotion was part of a *pattern* of discrimination--a continuing violation. We now consider this argument in light of the three factors suggested by the Fifth Circuit in Berry.
>
> First, subject matter: do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? All four acts allegedly stem from age and/or race discrimination and involve the same type of action: taking away responsibility from Ms. Selan. Thus, this first factor militates in favor of finding a continuing violation. Second, frequency: are the alleged acts recurring (e.g., a biweekly paycheck) or more in the nature of an isolated work assignment or employment

> decision? Almost two years passed between the late-1985 removal of individual psychotherapy duties and the October 1987 removal of clinical supervisory duties. This considerable separation weighs heavily against finding a continuing violation. Third, degree of permanence: did the time-barred act have the degree of permanence which should have triggered the employee's awareness that his rights were violated? Ms. Selan offered no evidence to support an inference that she considered any of the changes to be temporary. In particular, the 1985 transfer, with the accompanying loss of designation as "unit head," is precisely the type of major, permanent change in employment status that should trigger an employee's awareness of the need to assert--or else lose--his rights.
>
> Thus, despite the fact that the alleged acts were similar in type, the two-year gap and the permanence of the 1985 transfer/demotion negates the contention that the acts were continuous or connected. Viewing the record and all inferences drawn from it in the light most favorable to Ms. Selan, we agree with the district court that there was no genuine issue of material fact whether there was a continuing violation. Even if each of the acts alleged was discriminatory . . . they were not part of a continuing violation. Thus, the district court was correct to grant the defendants partial summary judgment; the claims stemming from the May 1985 transfer/demotion were time-barred.

Selan v. Kiley, 59 FEP Cases at 779-80.

Continuing Violation--Ms. Tafelski's case

The one allegation which occurred during the actionable period was Mr. Hensrud's checking on Ms. Tafelski's whereabouts, which was alleged to be due to either disparate treatment based on sex or to a sexually harassing atmosphere. Each alleged act of unequal treatment and/or sexually harassing acts listed in section B of this ruling, has potential connection under the continuing violation doctrine. The Commission, however, rejects items designated in section B as 1a. and 1b., for further consideration because Ms. Tafelski has provided no dates for the alleged occurrences. The failure to provide dates by this point in time is fatal to those claims.

The Commission also rejects all handicap allegations from further consideration. The one event which occurred during the actionable period was not alleged to be related to handicap discrimination. The acceptance of one discriminatory theory during the actionable period cannot be used under

the continuing violation doctrine to "bootstrap" prior claims brought under an unrelated, separate discrimination theory. See, for example, Jensvold v. Shalala, 62 FEP Cases 1177, 1182-3 (DC MD, 1993), where the court found one unequal treatment incident during the actionable period and refused to apply the continuing violation doctrine to encompass prior alleged acts of harassment because such claims were "factually and legally distinct".

The next question is whether the continuing violation doctrine should be applied to the surviving allegations of unequal treatment/sex harassment (the surviving allegations are designated in section B of this ruling as 1c. *through* 1e, 1f.--*actions prior to the limitations period*; 1g.--*as amended by* 1i., and 1h.) The first theory of the continuing violation doctrine discussed in Selan, pertains to cases where the employer's decision-making process takes place over a period of time, making it difficult to pinpoint the exact day the "violation" occurred. The first theory is inapplicable to Ms. Tafelski's case because she does not claim that the date of occurrences were difficult to pinpoint due to the nature of the employer's decision-making process, nor would the record support such a conclusion. The second theory is inapplicable because Ms. Tafelski does not claim that any surviving action was taken based on an express/open policy of the employer.

The third theory of the continuing violation doctrine discussed in Selan, pertains to an alleged period of time over which the employer has followed a covert practice of discrimination evidenced only by a series of discrete, allegedly discriminatory, acts. Resolution of this theory to the facts of Ms. Tafelski's case involves an analysis of the three factors suggested by the Berry court. First, subject matter: do the alleged facts involve the same type of discrimination, tending to connect them in a continuing violation? Arguably, this question must be answered affirmatively because all acts have the same alleged discriminator (Hensrud), all acts occurred within a relatively short time period (December 1993 to November 7, 1994) without a significant period of time lapsing inbetween, and all acts are alleged to have occurred due to sex discrimination. Second, frequency: are the alleged acts recurring or more in the nature of an isolated work assignment or employment decision? The only remaining allegation which could be characterized as "recurring" as opposed to "isolated work assignment or employment decision", would be Mr. Hensrud's checking up on Ms. Tafelski's whereabouts. Third, permanence: Does the act

have the degree of permanence which should trigger an employee's awareness and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate? Again, the only remaining allegation meeting this third factor would be Mr. Hensrud's checking up on Ms. Tafelski's whereabouts.

Continuing Violation -- Summary

The only act outside the actionable period which meets the Selan analysis of a continuing violation is Mr. Hensrud's checking upon on Ms. Tafelski's whereabouts. All other alleged incidents occurring before the actionable period were discrete, separate events which Ms. Tafelski should have known to pursue at the time of occurrence. She cannot use the continuing violation doctrine to resurrect those stale claims.

F. Conclusion

The only allegations surviving the UW's motion are those pertaining to Mr. Hensrud's checking up on Ms. Tafelski's whereabouts, including such incidents occurring prior to and during the actionable period.[1] All other claims are dismissed.

ORDER

The UW's motion to dismiss based upon timeliness issues is granted in part and denied in part, as detailed in this ruling. The Commission retains

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[1] This conclusion was based on the assumption that Ms. Tafelski's allegation of Hensrud's checking up on her whereabouts continued to occur within the actionable period. It could be, however, that Ms. Tafelski ultimately would be unable to prove the existence of such conduct during the actionable; in which event the timeliness ruling here could be revisited by the Commission.

jurisdiction to complete the investigatory phase of the allegations which survived the UW's Motion.

Dated March 22, 1996.

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

JMR

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